In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 683

BEULAH GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question here is whether payments petitioner received for the right to extract and remove minerals from her land were long-term capital gain, as she claimed, or depletable ordinary income, as the court below held.

Petitioner entered into a "lease contract" that entitled the "lessee" to mine and remove lime rock from petitioner's land in consideration of a "royalty" of five cents per ton removed with a "minimum advance royalty" of $3,000 per year guaranteed. The agreement was for a ten-year period, and the "lessee" had the option to renew the "lease" for an additional ten years. But the agreement also empowered the "lessee"

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to terminate the arrangement at any time, upon written notice and payment of $500, if the "lessee" was of the opinion that mining could not be continued at a profit. (Pet. App. D 19–21.)

In her 1961 income tax return, petitioner reported payments received under the contract as long-term capital gain. The Commissioner determined that the receipts were depletable ordinary income (Pet. App. D 22). Petitioner paid the resulting deficiency and sued for a refund (Pet. App. D 18–19). The district court ruled in favor of petitioner (Pet. App. D 21–22). The court of appeals reversed, holding that petitioner had retained an "economic interest" in the minerals and, accordingly, that the "royalty" payments were depletable ordinary income (Pet. App. A 12–14). This decision is sound and further review is unwarranted.

1. Petitioner errs in her assertion (Pet. 6) that "the weight of authority" requires capital gain treatment of payments received by a landowner as consideration for the right to remove minerals from the land, when such payments are a fixed amount per unit as and when removed. In a long line of cases this Court has made it clear that, where a landowner grants the right to extract and remove minerals from his land in consideration of payments dependent solely on extraction, the payments he receives are depletable ordinary income and not capital gain. *E.g.*, *Palmer* v. *Bender*, 287 U.S. 551, 557; *Commissioner* v. *Southwest Expl. Co.*, 350 U.S. 308, 314. It does not matter whether the grantor's compensation is payable in cash rather than kind, *Helvering* v. *Twin Bell*

Syndicate, 293 U.S. 312, represents a percentage of the gross revenue, *Burnet* v. *Harmel,* 287 U.S. 103; *Palmer* v. *Bender, supra,* or of the net profits, *Kirby Petroleum Co.* v. *Commissioner,* 326 U.S. 599, or, as in the present case, a fixed amount per ton of minerals removed, *Bankers Coal Co.* v. *Burnet,* 287 U.S. 308; *Douglas* v. *Commissioner,* 322 U.S. 275, 280.

Accordingly, the court of appeals properly ruled here that petitioner's royalty was depletable ordinary income. Recent appellate decisions in four other circuits are squarely in accord. See *Royalton Stone Corp.* v. *Commissioner,* 379 F. 2d 298 (C.A. 2), petition for certiorari pending, No. 604, this Term; *Laudenslager* v. *Commissioner,* 305 F. 2d 686 (C.A. 3), certiorari denied, 371 U.S. 947; *Schreiber* v. *United States* (C.A. 7), decided July 17, 1967 (20 A.F.T.R. 2d 5126); *Freund* v. *United States,* 367 F. 2d 776 (C.A. 7); *Rabiner* v. *Bacon,* 373 F. 2d 537 (C.A. 8).

2. Petitioner asserts (Pet. 6–7) that the instant decision is in conflict with *Linehan* v. *Commissioner,* 297 F. 2d 276 (C.A. 1); *Gowans* v. *Commissioner,* 246 F. 2d 448 (C.A. 9); and *Barker* v. *Commissioner,* 250 F. 2d 195 (C.A. 2). A conflict with these cases is also asserted in the pending petition for certiorari in *Peeler* v. *United States,* 375 F. 2d 531, No. 471, this Term, which, like the instant case, the Fifth Circuit decided on authority of its decision in *Wood* v. *United States,* 377 F. 2d 300, petition for certiorari pending, No. 475, this Term.[1] For our response, we refer this Court to the discussion of *Linehan, Gowans*

[1] See also *Royalton Stone Corp.* v. *Commissioner,* 379 F. 2d 298 (C.A. 2), petition for certiorari pending, No. 604, this Term.

and *Barker* at pp. 4–8 of our memorandum in opposition in No. 471.[2]

3. Petitioner also asserts a conflict with *United States* v. *White*, 311 F. 2d 399 (C.A. 10). The court in *White* did not reach, but expressly reserved, the question whether royalty payments were depletable ordinary income reflecting a retained "economic interest" or capital gain from a sale. The court held only that a large lump sum downpayment was capital gain.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] Copies of that memorandum are being served on counsel for petitioner here.

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